J Raju v Kwong Yik Bank Bhd & Anor

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-552 OF 1991
HARUN HASHIM, PEH SWEE CHIN AND WAN YAHYA SCJJ
6 MAY 1994

Land Law *— Sale of land — Application for removal of caveat — For caveator to satisfy court that he had caveatable interest in land — Satisfy court that his claim to the interest in the property would raise a serious question to be tried — National Land Code 1965 ss 323 & 327*

Land Law *— Sale of land — Order for sale — Three unsuccessful auctions — Chargor not notified of date of final auction sale in which property was sold — Whether a copy of the order for sale had to be served on chargor as regards subsequent sales — National Land Code 1965 ss 258(1)(a) & 259(2)(c)*

Land Law *— Sale of land — Auction — Right of set off — Whether purchaser could assume right of set off even before he was successful in the bidding — Breaches of conditions of sale*

Land Law *— Sale of land — Order for sale — Chargor disputed sale and entered caveat on land — Subsequent sale of land to third party even with existence of caveat — Issues best dealt with at trial*

The appellant was the registered proprietor of a property ('the property') which was charged to Perwira Habib Bank Bhd and Kwong Yik Bank Bhd ('the respondents'), both respondents ranking pari passu with the other. Foreclosure proceedings were taken out by the respondents and an order for sale was issued. After three unsuccessful auctions, a fourth auction was held in which the respondents were the highest bidders at the sale. They however, did not comply with the conditions for sale, which required that they pay a 10% deposit to the senior assistant registrar ('the SAR') before the auction. Nevertheless the SAR declared them to be the successful bidders, presumably on the reason that they were entitled to set off the 10% against the sum due on the charge.

The appellant claimed that he was not notified of the date of the auction sale and was aggrieved by the breaches of its conditions, and therefore entered a private caveat against the land which was duly registered. A couple of months after that, the respondents entered into an agreement to sell the property to Mitsubishi Corp ('Mitsubishi'). Mitsubishi has since filed another caveat on the property. The respondents made an application for the removal of the caveat and the High Court allowed the application, holding that the appellant had divested his interest in the land. The appellant has appealed.

Held, allowing the appeal:

(1) The vendor of land is only regarded as having divested himself of the beneficial interest in his land and vested it in the purchaser at the time when the purchase money has been paid in full. As these answers on full payment and execution of transfer documents were not available before the court, the trial judge was therefore not in a position to come to the conclusion, as he did, that the appellant had divested his interest in the property and for that reason, conclude that there was nothing left for the appellant to caveat.

(2) In an application under s 327 of the National Land Code 1965 ('the NLC') by a caveatee for the removal of a caveat, the onus lies upon the caveator to satisfy the court that he has a caveatable interest in the land. The appellant in this case would have a caveatable interest if he could satisfy the court that his claim to the interest in the property would raise a serious question to be tried.

(3) The requirement to serve a copy of the order of the court on the chargor to notify him of the date of the auction was provided initially by s 258(1)(a) of the NLC. The provision in s 259(2)(c) as regards subsequent sale however was silent on this particular requirement although there was a specific requirement for the sale to be publicly advertised in the same manner as previously directed. The mere omission by the legislature to mention a specific procedure would not detract from the principle that such direction by an officer of the court had to be exercised judiciously after giving the parties the opportunity of being heard.

(4) The conditions of sale in the fourth auction sale allowed the chargees merely to set off the purchase price against the amount due on the charge in the event of him becoming a purchaser. This means that the right to set off could only arise at that stage when the chargees were declared the successful bidders and certainly not before then. Moreover, para 4 of the conditions of sale required all intending bidders to deposit 10% of the reserve price with the SAR. The term 'all intending bidders' must necessarily include the respondents who had not at that moment even bidden let alone become a purchaser.

(5) The subsequent agreement of sale to Mitsubishi was dated three months after the entry of the appellant's caveat. These events which could lead to the question of indefeasibility and notice are matters to be dealt with at a proper trial.

(6) Considering all the issues raised by the appellant and the reply deposed to by the respondents, there was conflict of evidence, which appeared on the face of it not to be inherently improbable.

Such conflict could not be disposed of on the basis of the affidavit evidence alone and such conflict should be determined at a proper trial. The evidence before the judge left serious questions to be tried and he should have maintained the status quo between the parties until the determination of the disputes.

Obiter:
A person who is entitled to initiate an action for a declaratory decree affecting his rights under the NLC is just as entitled as a person seeking specific performance or an injunction to enter a caveat pending the disposal of his suit.

[Bahasa Malaysia summary

Perayu merupakan pemilik berdaftar suatu hartanah ('hartanah itu') yang telah digadai kepada Perwira Habib Bank Bhd dan Kwong Yik Bank Bhd ('responden'), kedua-dua responden berkedudukan pari passu antara satu sama lain. Prosiding perampasan telah dimulakan oleh responden dan suatu perintah jualan telah dikeluarkan. Setelah gagal sebanyak tiga kali untuk menjual hartanah itu secara jualan lelong, jualan lelong yang keempat telah diadakan di mana responden merupakan pembuat tawaran yang paling tinggi. Akan tetapi, mereka tidak mengikut syarat penjualan, yang mengkehendaki supaya mereka membayar deposit 10% kepada penolong kanan pendaftar ('PKP itu') sebelum jualan lelong itu. Walau bagaimanapun, PKP itu telah mengisytiharkan bahawa mereka merupakan pembuat tawaran yang berjaya, mungkin atas alasan bahawa mereka berhak menolak 10% itu daripada jumlah yang terhutang di bawah gadaian itu.

Perayu mengatakan bahawa beliau tidak diberitahu mengenai tarikh jualan lelong itu dan terkilan kerana kemungkiran syaratnya, dan oleh itu, telah memasuk dan mendaftarkan suatu kaveat persendirian ke atas hartanah itu. Dua bulan selepas itu, responden telah mengikat suatu perjanjian untuk menjual hartanah itu kepada Mitsubishi Corp ('Mitsubishi'). Mitsubishi juga telah memfailkan suatu kaveat ke atas hartanah itu. Responden telah membuat suatu permohonan supaya kaveat itu diketepikan dan Mahkamah Tinggi telah membenarkan permohonan itu, sambil membuat keputusan bahawa perayu telah melucutkan kepentingannya di dalam hartanah itu. Perayu telah membuat rayuan.

Diputuskan, mambenarkan rayuan itu:
(1) Seorang penjual tanah hanya boleh dianggap sebagai telah melucutkan kepentingan benefisialnya atas tanah itu dan meletakhakkannya pada pembeli itu pada masa wang pembelian dibayar sepenuhnya. Memandangkan bahawa jawapan mengenai pembayaran penuh dan penyempurnaan dokumen pemindahan tidak berada di hadapan mahkamah, hakim perbicaraan dengan itu tidak berkedudukan untuk membuat keputusan, sebagaimana

yang telah dibuatnya, bahawa perayu telah melucutkan kepentingannya di dalam hartanah itu dan atas sebab itu, telah membuat keputusan bahawa tidak terdapat apa-apa yang tinggal untuk dikaveatkan oleh perayu.

(2) Di dalam suatu permohonan di bawah s 327 Kanun Tanah Negara 1965 ('KTN itu') oleh seorang penanggung kaveat untuk mengetepikan kaveat itu, beban membukti terletak pada pengkaveat untuk memuaskan mahkamah bahawa beliau mempunyai kepentingan yang boleh dikaveat. Di dalam kes ini, perayu akan mempunyai suatu kepentingan yang boleh dikaveat jika beliau boleh memuaskan mahkamah bahawa tuntutan beliau ke atas suatu kepentingan di dalam hartanah itu akan menimbulkan soalan serius yang perlu dibicarakan.

(3) Keperluan untuk menyampaikan sesalinan perintah mahkamah ke atas seorang penggadai untuk memberitahunya tentang tarikh lelong mula-mula diperuntukkan oleh 258(1)(a) KTN itu. Akan tetapi, peruntukan di dalam s 259(2)(c) tidak menyatakan apa-apa mengenai penjualan yang terkemudian walaupun terdapat keperluan spesifik supaya jualan itu diiklan secara awam mengikut cara yang telah diarahkan dahulu. Ketinggalan semata-mata oleh badan perundangan untuk menyatakan prosedur yang spesifik tidak bermakna prinsip bahawa arahan sedemikian oleh seseorang pegawai mahkamah mesti dilaksanakan dengan bijak selepas memberi peluang kepada kesemua pihak untuk didengar, tidak perlu diikuti.

(4) Syarat-syarat penjualan di dalam jualan lelong yang keempat itu hanya membenarkan pemegang gadaian menolak harga belian itu daripada jumlah yang terhutang di bawah gadaian itu jika beliau menjadi pembeli hartanah itu. Ini bermakna bahawa hak untuk menolak itu hanya timbul pada peringkat di mana pemegang gadaian diisytiharkan sebagai pembuat tawaran yang berjaya dan tentunya tidak sebelum itu. Lebih-lebih lagi, perenggan 4 di dalam syarat-syarat penjualan itu memperuntukkan supaya kesemua bakal pembuat tawaran mendepositkan kepada PKP itu 10% daripada harga rizab itu. Terma 'kesemua bakal pembuat tawaran' sememangnya mesti termasuk responden yang belum pada masa itu membuat sebarang tawaran, apatah lagi menjadi seorang pembeli.

(5) Perjanjian penjualan yang seterusnya kepada Mitsubishi bertarikh tiga bulan selepas perayu memasukkan kaveat itu. Kejadian sedemikian yang membawa kepada soalan mengenai ketidak boleh sangkalan dan notis merupakan perkara yang sepatutnya dipertimbangkan di dalam suatu perbicaraan yang sebenar.

(6) Memandangkan kesemua isu yang telah dibangkitkan oleh perayu dan jawapan yang telah dideposkan oleh responden, mahkamah berpuas hati bahawa terdapat precanggahan keterangan, yang nampaknya memang dapat dipercayai pada permukaannya. Percanggahan sedemikian tidak boleh diselesaikan atas keterangan

afidavit sahaja dan percanggahan sedemikian sepatutnya diputuskan pada suatu perbicaraan yang sebenar. Keterangan di hadapan hakim meninggalkan soalan-soalan serius untuk diputuskan dan beliau sepatutnya mengekalkan status quo di antara pihak-pihak sehingga pertikaian diselesaikan.

Obiter:
Seseorang yang berhak memulakan suatu tindakan untuk suatu dekri deklaratori yang berkenaan dengan haknya di bawah KTN itu juga berhak memasukkan suatu kaveat, sama seperti seorang yang menuntut pelaksanaan spesifik atau injunksi, sementara menunggu guaman itu diselesaikan.]

Notes
For cases on caveats, see 8 *Mallal's Digest* (4th Ed) paras 1837–1845.
For cases on orders for sale, see 8 *Mallal's Digest* (4th Ed) paras 1915–1925; [1989] Mallal's Digest 1119–1123; [1990] Mallal's Digest 867–879; and [1991] Mallal's Digest 1364–1381.
For a case on a sale by order of court, see 8 *Mallal's Digest* (4th Ed) para 1945.

Cases referred to
1 *Karuppiah Chettiar v Subramaniam* [1971] 2 MLJ 116 (refd)
2 *Temenggong Securities Ltd & Ors v Registrar of Titles, Johore & Ors* [1974] 2 MLJ 45 (refd)
3 *Macon Engineers Sdn Bhd v Goh Hooi Yin* [1976] 2 MLJ 53 (refd)
4 *Macon Works & Trading Sdn Bhd v Phang Hon Chin & Anor* [1976] 2 MLJ 177 (refd)
5 *Sing Lian Express Sdn Bhd v Soh Kim Tee* [1974] 2 MLJ 24 (refd)
6 *RAP Nathan v Haji Abdul Rahman bin Haji Yusoff & Ors* [1980] 1 MLJ 248 (refd)
7 *Krishna Kumar v United Malayan Banking Corp Bhd* [1983] 1 MLJ 106 (refd)
8 *United Malayan Banking Corp Bhd v Development and Commercial Bank (Ltd) Bhd* [1983] 1 MLJ 165 (refd)
9 *Jit Kaur v Parl Singh* [1974] 2 MLJ 199 (refd)
10 *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294 (refd)
11 *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212 (refd)

Legislation referred to
National Land Code 1965 s 323(1)

Appeal from: Originating Summons No S6–24–2598–89 (High Court, Kuala Lumpur)

Dennis Xavier (*Rafie bin Omar* with him) (*Jayaraman, Ong & Co*) for the appellant.

A *Wong Chong Wah* (*Leong Wai Hong* with him) (*Skrine & Co*) for the respondents.

Cur Adv Vult

B **Wan Yahya SCJ** (delivering the judgment of the court): On 16 December 1991, the High Court at Kuala Lumpur allowed the application by the respondents ('the chargees') for the removal of a caveat made under s 327 of the National Land Code 1965 ('the NLC'). The appellant ('the chargor') is dissatisfied with that decision.

The events that transpired between the parties in so far as they are C relevant to the present appeal are as follows: The appellant was the registered proprietor of a property held under Geran No 12088, Lot 76, Sek 89, Bandar Kuala Lumpur, Wilayah Persekutuan ('the property') which was charged to Perwira Habib Bank Bhd and Kwong Yik Bank Bhd ('the chargees'), both chargees ranking pari passu with the other.

D Foreclosure proceedings were taken out by the chargees in the High Court Kuala Lumpur and an order of sale was issued on 7 February 1986. The auction sale subsequently fixed for 3 July 1987 ('the first auction sale') had to be called off because the chargor had on the same day obtained an interim injunction restraining the conduct of the sale. The injunction was later dissolved by Ajaib Singh J (as he then was) on 7 August 1987 and the E auction sale was ordered by the same judge to take place on 29 October 1987 ('the second auction sale'), such sale to be so in accordance with summons for directions dated 22 January 1987 (at p 146). At the second auction sale, there was no bidder and the auction was postponed. On 13 July 1988, the plaintiff wrote to the senior assistant registrar ('SAR') F asking for a new auction date and the third auction sale was fixed for 20 October 1988, copies of these letters were not extended to the chargor. According to the chargees' affidavit the third auction sale was again called off because of some differing particulars appearing in the proclamation of sale and in the court files. On 19 October 1988 (after a lapse of about one year), the SAR by letter (exh B3) appointed the same auctioneer to conduct G the sale on 25 November 1988 ('the fourth auction sale').

The fourth auction was subject to conditions of sale allegedly on similar terms as the previous one prepared in the second auction sale. The relevant conditions applicable to our present case are:

H 2 The chargee be and is hereby at liberty to bid at the sale *and in the event* of him becoming the purchaser *to set off* the purchase price against the *amount due* on the said charge on the said date of sale, plus the costs and expenses of the sale plus all costs due from the chargor by way of cost in this order of sale.

3 No bid shall be less in advance of the previous bid than a sum to be fixed by the penolong kanan pendaftar, Mahkamah Tinggi Kuala Lumpur, at the I time of sale and no bid shall be retracted.

4 All *intending bidders* are required to deposit with the penolong kanan pendaftar, Mahkamah Tinggi Kuala Lumpur, 10% of the fixed reserve price for the said property by bank draft in favour of the penolong kanan pendaftar,

Mahkamah Tinggi Kuala Lumpur, *prior* to the auction sale. (Emphasis added.)

The chargees who were the highest bidders at the sale did not pay the 10% deposit. Nevertheless, the SAR declared them to be the successful bidders, presumably on the same reason as given in the chargees' affidavit that they were entitled to set off that amount against the sum due on the charge. It was not until three days later, ie on 28 November 1988 that the chargees paid a sum of RM250,000.

The chargor, who claimed that he was not notified of the date of the auction sale and aggrieved by the breaches of its conditions, entered a private caveat which was registered on 5 June 1989.

The certificate of sale was not exhibited in any affidavit but it would appear from the letter written by the chargees' solicitor to the deputy registrar, High Court Kuala Lumpur, dated 30 May 1989 that although the certificate of sale was issued on 30 March 1989, registration of which was refused by the Pemungut Hasil Tanah, Wilayah Persekutuan on some technical error. Registration of the sale was subsequently entered sequently after the registration of the chargor's caveat and peculiarly endorsed with the statement 'catatan dalam daftar pada 18 April 1989 jam 10.20 pagi'.

On 7 August 1989, about two months after the chargor's caveat was entered, the chargees entered into an agreement to sell the property to Mitsubishi Corp for RM3,782,586.

Mitsubishi has since filed another caveat on the property. We are not concerned with Mitsubishi's caveat in this appeal.

The chargees consequently made an application for the removal of the caveat dated 5 June 1989, entered by the chargor. The application was heard and an order in terms of the application was made by the High Court on 16 December 1991. The chargor appealed.

At the end of the hearing in the High Court, the trial judge noted:

> The evidence is that the defendant has divested his interest in the land. There is no caveat to be entered. Caveat was wrongly entered. Application allowed with costs.

It would appear from this that the learned trial judge was unduly concerned with the submission of counsel for the chargees regarding the subsequent sale of the property from the chargees to Mitsubishi, although the matter was not raised in the affidavits filed by the chargees. In fact, para 17 of the affidavit of Tan Cheong Eng, assistant general manager of the first chargee (first plaintiff's company in the High Court originating summons), affirmed on 31 May 1990 and filed in support of the plaintiff's application reads:

> The plaintiffs have entered into a contract with Mitsubishi Corp for the sale of the land in question. My affidavit of 19 December 1989 did not mention the said sale as I have been advised and verily believe that it has *no relevance* to the issues if any between the plaintiffs and the defendant herein. (Emphasis added.)

It is obvious from the above paragraph that the sale to Mitsubishi was never intended to be one of the chargees' grounds in their application under s 327 of the NLC. Even if the matter had been raised, the affidavit evidence

indicated only the payment of 10% deposit by Mitsubishi. Despite the references in the affidavits of both parties, that Mitsubishi was the purchaser of this property, there was nothing in the evidence to show on which date the balance of the purchase price was made and when the document of transfer was signed.

It must be appreciated that in a transaction of sale of land under our Torrens system, the estate and interest in the land remain with the registered proprietor until he has done all that is necessary to divest the estate out of himself and vest it in the transferee.

According to our local authorities, the vendor of the land is only regarded as having divested himself of the beneficial interest in his land and vested it in the purchaser at the time when the purchase money has been paid in full. See *Karuppiah Chettiar v Subramaniam*;[1] and *Temenggong Securities Ltd & Ors v Registrar of Titles, Johore & Ors*.[2]

As these questions on full payment and execution of transfer documents were not available before the court, the learned trial judge was therefore not in a position to come to the conclusion, as he did, that the property had been divested to Mitsubishi and for that reason, conclude that there was nothing left for the chargor to caveat.

Notwithstanding this error, we feel disposed to look into the entire records to determine the merits of the application.

In this application under s 327 of the NLC by a caveatee for the removal of a caveat, the onus lies upon the caveator to satisfy the court that he has a caveatable interest in the land. Section 323(1) of the NLC lists out the persons at whose instance a caveat may be entered as:

> (a) any person or body claiming title to, or any registrable interest in, any alienated land or any right to such title or interest;
> (b) any person or body claiming to be beneficially entitled under any trust affecting any such land or interest; and
> (c) the guardian or next friend of any minor claiming to be entitled as mentioned in paragraph (b).

However in various recent cases, the courts have given the section, in particular sub-s (1)(a), a wider and liberal interpretation to include purchasers of land, company owners, chargees, tenants and even an option holder. See *Macon Engineers Sdn Bhd v Goh Hooi Yin*;[3] *Macon Works & Trading Sdn Bhd v Phang Hon Chin & Anor*;[4] *Karuppiah Chettiar v Subramaniam*[1] and *Sing Lian Express Sdn Bhd v Soh Kim Tee*.[5] The rationale behind these interpretations on the caveatee's interest was stated by Hashim Yeop Sani J (as he then was) in the *Macon Works* case[4] at p 182 as follows:

> It is of interest to note that in this case a caveat is in existence in respect of the said land and no action has been taken by the defendants for an order to remove the caveat on the grounds that the plaintiff has no interest in the terms of the National Land Code 1965 for capacity to lodge the caveat. It has been well established that as far as our Land Code is concerned the whole system of caveats is founded on the principle that they exist for the protection of *alleged* as well as proved interest and therefore not only is a person who has a right to a registrable interest in land who may enter a caveat but also any person claiming title to it or any registrable interest in any alienated land or even claiming only a

right to such title or registrable interest may enter a caveat — see *Mahadevan & Anor v Patel* [1975] 2 MLJ 207; also *Jit Kaur v Parl Singh* [1974] 2 MLJ 199 at p 201 col 1A–D; *Nanyang Development (1966) Sdn Bhd v How Swee Poh* [1970] 1 MLJ 145 at p 145C and p 146 col 2D; and *Inter-Continental Mining Co Sdn Bhd v Societe Des Etains De Bayas Tudjuh* [1974] 1 MLJ 145. (Emphasis provided.)

The above pronouncement on caveatable interest was echoed by Syed Agil Barakbah J (as he then was) in *RAP Nathan v Haji Abdul Rahman bin Haji Yusoff & Ors*[6] at p 251 where his Lordship said:

Now, the whole system of caveats is founded on the principle that they exist for the protection of alleged as well as for proved interests and of interests that have not yet become actual interests in land.

Yet another dimension of the application of s 323(1)(a) is to be found in *Krishna Kumar v United Malayan Banking Corp Bhd.*[7] In that case, the applicant gave MBF the first charge on his land and had agreed to create a second charge over it in favour of UMBC, conditional upon MBF's consent. Although the instrument relating to the second charge was duly prepared and executed, the papers could not be presented for registration because of MBF's subsequent refusal to give the consent. In holding that UMBC was entitled to enter a caveat, Gunn Chit Tuan J (as he then was) said at pp 108–109:

The fact that MBF had not endorsed its consent on an annexure to the said charge which might therefore not be accepted by the relevant administrative authorities, did not in my view detract from the fact that it is an instrument of charge in registrable form and that even if the relevant authorities had refused to accept it for registration, nevertheless the bank had in my judgment a registrable interest in the said lands within the meaning of s 323(1)(a) of the National Land Code 1965.

Even if it is considered that the bank did not have any registrable interest in the said lands because the charge in question was not in a statutory form which complied with the relevant provisions of the National Land Code 1965, I was of the view that this case was also covered by the last limb of s 323(1)(a) of the said National Land Code. In this case, even if it was considered that the bank had no registrable interest because the relevant charge was not in a registrable form without MBF's consent, I considered that in the circumstances of this case, the bank had a right to such registrable interest.

Although the first issue of the above cited passage was not followed in the Federal Court case of *United Malayan Banking Corp Bhd v Development and Commercial Bank (Ltd) Bhd*,[8] in which it was held that failure to obtain consent of the first chargee did not constitute a caveatable interest, we are of the view that the second proposition of law, ie a mere right to registrable interest (as opposed to proved right to registrable interest) is sufficient ground for invoking that provision of s 323(1)(a).

To the extent or degree indicated, these cases had dealt with the existence of caveatable interests arising out of the conduct of disputes between the actual parties to the charges (purchasers, owners, etc) themselves but not on account of some misapplication of the law, misdirection or serious impropriety by the officers appointed under s 12 of the NLC or other

officers of the court in particular those exercising the powers relating to the sale and registration of lands under the NLC.

In an earlier case, *Jit Kaur v Parl Singh*[9] Hashim Yeop A Sani J (as he then was) held that the proposed action of a party to challenge the transfer of his land to another constituted sufficient ground for the entry of a private caveat.

At p 201E of his judgment, the learned judge said:

> The respondent is one of the beneficiaries of Gurdial Singh s/o Cherah Singh. See also his statutory declaration in respect of his application to enter the caveat — (exh 'A' in affidavit affirmed on 24 February 1973). He is at the moment also one of the holders of letters of administration of the estate of the said Gurdial Singh s/o Cherah Singh (deceased) and is seeking to challenge the validity of transfer of this land. The respondent is in my view a person entitled to apply to enter a private caveat under s 323(1) of the National Land Code 1965.

Jit Kaur's case[9] however involves the alleged wrongdoing by one party to a land transfer and not one involving errors or actions which are ultra vires the NLC committed by any officer appointed under s 12 of the NLC or officer of the court. We are of the view that a person who is entitled to initiate an action for a declaratory decree affecting his rights under the NLC is just as entitled as a person seeking specific performance or an injunction to enter a caveat pending the disposal of his suit.

Recently in *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor*,[10] this court upheld the declaratory decree and the consequential reliefs granted by the Johor Bahru High Court in respect of an improper auction sale by a SAR who was found to have acted ultra vires the NLC. In the same manner, we hold that the chargor in this case would have a caveatable interest if he could satisfy the court that his claim to the interest in the property would raise a serious question to be tried. See *Eng Mee Yong & Ors v V Letchumanan*.[11]

It is therefore incumbent upon us to go into the affidavit evidence of the parties to determine this issue. It was not disputed that the first auction sale scheduled for 3 July 1987 was aborted by an interim injunction and the second auction sale was to have taken place on 29 October 1987 after the injunction was dissolved. The second auction sale was again aborted as there was no bidder. The SAR, at the request of the chargees, then appointed an auctioneer and fixed the third auction sale on 20 October 1988. However there was nothing on record to show that the appointed date was ever communicated to the chargor. The third auction sale was also aborted because of some discrepancies between the proclamation of sale and the summons for directions. The fourth auction sale was scheduled on 25 November 1988, ie after a lapse of about one year and three months from the first auction sale. As transpired at the third auction sale, there appeared to be no notice at all given to the chargor regarding the fourth auction sale date.

The chargor's first complaint is that as he was not notified of the date of the auction sale, he was deprived from exercising his right to redeem the property — a right which was open to him until the fall of the hammer. The requirement to serve a copy of the order of the court on the chargor is

provided initially by s 258(1)(a) of the NLC. The provision in s 259(2)(c) as regards subsequent sale however was silent on this particular requirement although there is a specific requirement for the sale to be publicly advertised in the same manner as previously directed. To our minds, the mere omission by the legislature to mention a specific procedure will not detract from the principle that such direction by an officer of the court has to be exercised judiciously after giving the parties the opportunity of being heard.

Moreover, the order made by the SAR on 22 January 1987, consequent to the order of the judge dated 7 February 1986, did specifically provide that in the event of the sale being abortive, the matter should be adjourned and a date fixed for further directions. This, we feel, is a strong indication of an obligation to hear both parties, and in particular, the chargor, before the SAR proceeded to issue any directions involving any change in the conditions or value of the property.

The first directions for the property to be sold at a reserved price of RM2,825,000 was made on 22 January 1987 and the subsequent directions for it to be sold at a reserved price of RM2,500,000 was made sometime in October 1988 — a lapse of one year and nine months. During this period, there could be either an appreciation or depreciation of the property in respect of which value, the chargor was entitled to be heard. It was also alleged by the chargor that the new directions of sale differed from the previous one, in which case, he should have been served with the amended conditions of sale. This allegation does not seem to be entirely baseless and could be more conveniently dealt with in a proper trial.

Another allegation raised by the chargor in his memorandum of appeal, is on the failure by the SAR to ensure the requisite payment of deposit in compliance with the conditions of sale before any rights of set-off against the sums due can be exercised. The order was initially made on 22 January 1987 before the first auction sale. The proclamation of sale in respect of the fourth auction sale which came after the aborted first, second and third auction sales merely adopted the same conditions despite the express provision for the SAR's to give further directions in the order dated 22 January 1987. Assuming for a moment that the conduct of the fourth auction sale without further directions was valid, we are nevertheless faced with the allegation of non-compliance with its conditions of sale.

Paragraph 2 of the conditions of sale in the fourth auction sale, as reproduced in the earlier paragraph of this judgment, allows the chargees merely to set off the purchase price against the amount due on the charge 'in the event of him becoming a purchaser'. To our minds, these words can be taken to mean that the right to set off could only arise at that stage when the chargees were declared the successful bidders or purchasers and certainly not before then. Our view on this interpretation is further reinforced by the terms of para 4 of the conditions of sale which requires 'all intending bidders' to deposit 10% of the reserve price with the SAR. The term 'all intending bidders' must necessarily include the chargees who had not at that moment even bidden let alone become a purchaser. Such construction is to our minds, consistent with the concept of an impartial need to put every bidder on the same footing and on equal terms in a public auction.

From the affidavits and documents exhibited in the appeal records, it would appear that the conditional sum of RM250,000 being the 10% of the reserve price was not deposited with the SAR before the auction sale held on 25 November 1988. Instead, a sum of RM2,000 being the mandatory cost payable under the order made on 22 January 1987 was paid before the sale and a further RM250,000 was only paid three days after (and not before) the sale. Under the circumstances, we feel that there is yet another serious triable issue raised by the chargor.

The third issue which challenged the bona fides conduct of the chargees and the subsequent buyer, Mitsubishi is by no means frivolous. The affidavit evidence indicate that the auction sale was held on 25 November 1988 and the caveat by the chargor was entered on 5 June 1989. The entry regarding the sale was then entered in sequence after the caveat but was wrongly dated 18 April 1989. From the sequence of events in the Register and the letter from the Jabatan Tanah Wilayah Persekutuan dated 30 May 1989 as (exhibited at p 317 of the appeal records) it would appear that the attempt to register the sale in accordance with ss 269(1) and 340 of the NLC, was initially refused and was eventually registered after the entry of the chargor's caveat. The subsequent agreement of sale to Mitsubishi was dated 7 August 1989, ie three months after the entry of the chargor's caveat. These events which could lead to the question of indefeasibility and notice are again matters to be dealt with at a proper trial.

Considering all the issues raised by the chargor and the reply deposed to by the chargees, we are satisfied that there exists conflict of evidence, which appears to us on the face of it not to be inherently improbable. We are of the view that such conflict cannot be disposed of on the basis of affidavit evidence alone and that such conflict should be determined at a proper trial. We agree with the chargor's counsel's submission that the evidence before the judge left serious questions to be tried and that he should have maintained the status quo between the parties until the determination of these disputes.

We therefore allow this appeal, set aside the order of the High Court and direct the caveat to remain until the final disposal of Suit No S3–22–63–1991. The respondent shall pay the costs here and in the court below. The deposit is to be returned to the appellant/chargor.

Appeal allowed.

Reported by Prof Ahmad Ibrahim